# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE ST. LOUIS SOUTHWESTERN RAILWAY Company, Appellant, *v.* THE UNITED STATES. } No. 184.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES.

### I.

### STATEMENT.

Appellant had the usual arrangements with the Post Office Department for the carriage of the mail and was receiving the usual compensation as provided by the statutes.

Appellant alleges that its contracts were signed, as to the Fourth Division lines, in the months of February to June of 1910, and as to the Third Division routes, the weighing and contracting occurred during the same period in 1911, the agreements to be effective on July 1 of 1910 and 1911 (Tr. 4) for four years (Tr. 2).

The Act approved August 24, 1912, Section 8 (37 Stat. 539, 557), created the parcel post, which increased the weight of packages from four pounds to

eleven pounds and the size not greater than seventy-two inches in length and girth combined (Tr. 4, 5). By orders of the Postmaster General in the summer and autumn of 1912, the parcel post was inaugurated on January 1, 1913 (Tr. 6).

No provision for compensation to the mail-carrying railways for the parcel post service was made until the Act of Congress approved March 4, 1913 (37 Stat. 791, 797), making appropriations for the expenses of the Post Office Department for the fiscal year ending June 30, 1914, was passed, which authorized the Postmaster General "to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum * * * until otherwise provided by law" (Tr. 6).

The weight limit of eleven pounds continued in effect until August 15, 1913, when the Postmaster General raised the limit to twenty pounds; and on January 1, 1914, he raised it to fifty pounds for the first two zones (Tr. 6).

Appellant alleges (Tr. 6) that "under said new designations of weight, and in accordance generally, with said orders of the Postmaster General, the parcel-post matter was transported by petitioner to the ends of its said contract periods."

By Act approved July 28, 1916 (39 Stat. 412, 425; Tr. 7), it was provided that on account of the increased weight of mails resulting from the Postmaster General's Order No. 7720 of December 18, 1913, effective January 1, 1914, the Postmaster

General was authorized to add to the compensation for transportation on railroad routes on and after January 1, 1914, "for the remainder of the contract terms, *not exceeding* one per centum thereof per annum," and because of the increased weight resulting from Order No. 7349 of July 25, 1913, effective August 15, 1913, the Postmaster General was authorized to increase the compensation for transportation on railroad routes on and after August 15, 1913, "for the remainder of the contract terms, *not exceeding* one-half of one per centum thereof per annum" (Tr. 7).

In adjusting the compensation under the Act of March 4, 1913, which authorized added compensation on account of the parcel-post service, the Postmaster General made increases ranging all the way from 1.6 per cent to 5 per cent, according to routes; but as to certain routes no added compensation was allowed (Tr. 7).

Under the Act of July 28, 1916, authorizing increases of ½ of 1 per cent and 1 per cent above the compensation already allowed and paid, the Postmaster General "allowed to the greater part of said routes, * * * the full rates of increase named therein." As to some of the routes, he allowed no increase (Tr. 8).

Apparently, without complaint or protest of any kind, the appellant continued to carry the mails and to accept the compensation as prescribed by the statutes authorizing the Postmaster General to adjust compensation within certain limits on

account of the increased weight and dimensions of the packages resulting from the parcel post. The statutes are unambiguous and clear; nor is it alleged or argued that the Postmaster General acted beyond or exceeded his authority in any manner whatsoever.

It is alleged that in December, 1912, a Committee on Railway Mail Pay addressed certain letters to the Chairman of the House Committee on Post Offices and Post Roads and to the Chairman of the so-called "Bourne Commission," pointing out that no satisfactory determination of the compensation due for the parcel post service could be reached before the service should be established, and suggestions were made with respect to provisions which should be contained in the statutes, which were not accepted (Tr. 9, 10).

Subsequently, in August, 1913, after the Postmaster General had announced the increases to be paid to the railroad companies with respect to the parcel-post matter limited to eleven pounds, the Committee on Railway Mail Pay submitted to the Postmaster General a protest in writing "against both (1) the denial of all compensation to the railroad companies for the parcel post service previous to July first just past and (2) the amounts proposed to be paid for the service commencing on that day" (Tr. 10). It is further alleged that "in other ways, during said contract terms, petitioner made protests to the Post Office Department on both of said points" (Tr. 10).

Of course it can not seriously be maintained that general representations made by a Committee on Railway Mail Pay to a committee of the House of Representatives or to the Postmaster General are in any sense a protest. Moreover, the Court will not consider undefined protests made "in other ways."

Without any statute whatsoever authorizing it, and without any power or authority whatsoever on the part of the Postmaster General to pay it, the appellant now claims that it is entitled to 15 per cent per annum with respect to the packages of eleven pounds weight and less; and for the entire portions remaining after August 15, 1913, of the contract periods, 6 per cent of the compensation for the transportation. Its claims are itemized by routes and dates (Tr. 8, 9).

On demurrer, the Court of Claims dismissed the petition (Tr. 13), and the appellant appealed.

## II.

### ARGUMENT.

Appellant maintains that its rights rest upon the Fifth Amendment (Br. 23), in that it did not contract to perform the parcel post service (Br. 14), and in performing that service for six months without any additional compensation and thereafter at an "almost insignificant compensation," the Government confiscated its property (Br. 16, 23).

That the real basis of appellant's claim rests on the initial six months of the service appears from the brief, wherein it is said (Br. 24):

> With regard to the periods when appellant received some small compensation for the par-

> cel-post service, the proof, conceivably, might fail on the question of confiscation and appellant could recover nothing. For the initial six months' service, when no compensation was paid, appellant should recover on the basis of *quantum meruit*, even though it should not make good its allegation that the 15 per cent pleaded was necessary to prevent confiscation.

This would seem to be a concession that the appellant is not claiming under any Act of Congress or any express contract authorizing the additional compensation; but it claims solely upon an implied contract alleged to arise under the Fifth Amendment from a supposed confiscation of its property or services for Governmental purposes.

The appellant's position is substantially the same as that of the carrier in *N. Y., N. H. & H. R. R.* v. *United States*, 251 U. S. 123, 126, wherein "appellant claims its property was taken for public use and adequate compensation must be paid." The Court, speaking through Mr. Justice McReynolds, said, however (p. 127), that prior to the Act of July 28, 1916, c. 261, 39 Stat. 412, 429, with the exception of certain roads aided by land grants, "railroads were not required by law to carry the mails," and that "as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it can not now claim an implied contract for a greater sum."

In *N. Y., N. H. & H. R. R.* v. *United States*, 258 U. S. 32, 34, this Court, speaking through Mr. Justice Holmes, again said:

> The service here, rightly or wrongly, was demanded as mail service, was rendered as mail service and was paid for without protest as mail service. Whether the Treasury technically complied with all the requirements of the statute concerning postal service did not matter to the claimant. By giving its claim a different name from that passed upon in *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, 127, the claimant does not better its case.

Appellant alleges that the Postmaster General, in making effective the Act of March 4, 1913, did not ascertain the weights of the parcel-post matter in relation to the railway routes, but that he merely, through examination and reports made by his subordinates, estimated, in proportion to the mails carried just before January 1, 1913, the weight of the parcel-post matter carried on the said routes (Tr. 7).

In *Delaware, L. & W. R. R. Co.* v. *United States*, 249 U. S. 385, 388, in rejecting that contention, this Court said:

> The references to average weights are not enough to require reweighing. They are an enumeration of the elements identifying and determining the present rates that are to be reduced. We see no reason to suppose that Congress intended to require a special and

> expensive investigation at the cost of the Government rather than to adopt the existing practice and to order the reduction without reference to the exact time when the last thirty days' weighing occurred or should occur.

Counsel argues that if the appellant is not entitled to the 15 per cent claimed, it is entitled, at least, to the 5 per cent provided in the Act of March 4, 1913, 37 Stat. 791, 797. (Br. 13.)

In *United States* v. *Atchison, T. & S. F. Ry. Co.*, 249 U. S. 451, 453, 454, this Court, in rejecting that argument, and speaking through Mr. Justice McReynolds, said:

> Acting under this provision, the Postmaster General refused to allow increased compensation of five per centum upon all routes, but apportioned payments among them—never in excess of five per centum—according to a carefully worked out formula which he deemed appropriate. Appellee sued for the difference between amount actually received and what it would have received if five per centum had been added. Considering history of the legislation and intent of Congress supposed to be indicated thereby, the Court of Claims held that the act "required the Postmaster General to add 5 per cent to the compensation being paid on all of said routes, and he having failed to do so that the plaintiff is entitled to recover the difference sued for." (52 Ct. Clms. 338, 361.)
>
> We are unable to agree with this conclusion. The language of the enactment is clear and

we think it vested in the Postmaster General a discretion which, so far as shown by the record, has not been abused. We are not unmindful of the burden imposed upon appellee nor of the circumstances which lend color to a different conclusion; but these are not sufficient to justify a disregard of the plain import of the words which Congress deliberately adopted.

In the *Mail Divisor Cases*, 251 U. S. 326, 339, Mr. Justice Pitney, with whom concurred Mr. Justice McKenna, in an opinion concurring in the affirmance of the judgment, but upon somewhat different grounds than those expressed in the opinion of Mr. Justice Holmes, said:

> From the findings of the Court of Claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Cls. 258, 308, 315, 318, 319) that the contracts arose not out of the Distance Circular, in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order; but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad company excepting it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No. 412, as all the claimants

had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. * * *

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the Court of Claims held (53 Ct. Cls. 258, 308, 313, 315, 318, 319.)

Counsel rely on *Freund* v. *United States*, Nos. 29 and 37, October Term, 1922, decided November 13, 1922 (Br. 20). In that case, this Court, speaking by Mr. Chief Justice Taft, said that the Court "have no

difficulty, therefore, in distinguishing this case from the so-called *Railroad Mail Cases.*"

In sustaining the demurrer and dismissing the appellant's petition, the Court of Claims, citing cases hereinbefore referred to, said (Tr. 13):

> The claim of the plaintiff is not founded upon a contract, express or implied, nor has any act of Congress authorized the payment of the additional amount demanded by the plaintiff.
>
> Congress authorized an increase in the compensation of the carriers not exceeding five per centum on account of parcel post, and this negatives the idea that Congress meant or understood that an implied contract was created by the parcel post act.
>
> It appears from the allegations of the petition that plaintiff voluntarily accepted and performed the service with knowledge of what it would receive, and it can not now claim an implied contract for a greater sum.

## III.

### CONCLUSION.

The appeal presents no question not already passed upon and disposed of by this Court in the previous cases. The judgment of the Court of Claims dismissing the petition should be affirmed.

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FEBRUARY, 1923.

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